United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,308

UNITED STATES OF AMERICA,

Appellee

639

-v-

JOHN W. McCORD,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

B R I E F F O R A P P E L L A N T

ANDREW J. KILCARR
1819 H Street, N.W.
Washington, D.C. 20006

Counsel for Appellant

Of Counsel:

Jonathan E. Gaines

Table of Contents

	Page
Jurisdictional Statement	1
Question Presented	2
Statement of the Case	2
Summary of Argument	5
Argument	6
THE GOVERNMENT IS REQUIRED TO PERFORM STANDARD TESTS UPON A WEAPON TAKEN INTO ITS POSSESSION AS THE INSTRUMENTALITY OF A CRIME WHEN IT KNOWS THAT THE RESULTS OF SUCH TESTS MAY BE VITAL TO THE ACCUSED'S DEFENSE	6
A. The Need for the Jury to Receive a Complete Picture of the Event	6
B. The Burden on the Defendant Resulting from Failure to Investigate Impartially	8
C Prejudice to the Accused	10
D. Limited Scope of Appellant's Argument	13
Conclusion	14

Authorities

Cases:	Page
Allison v. Holman, 326 F.2d 294 (5th Cir. 1963), Cert. denied 376 U.S. 957 (1964)	7
Application of Kapatos, 208 F.Supp. 883 (S.D.N.Y. 1962)	8
Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964)	6
Berger v. United States, 294 U.S. 78 (1935)	10
Brady v. Maryland, 373 U.S. 83 (1963)	6,7,10
Campbell v. United States, 365 U.S. 85 (1961)	7,9
Commonwealth ex rel. Sheeler v. Burke, 74 Pa. D.&C. 241, aff'd en banc 367 Pa. 152, 79 A.2d 654 (1951)	8,9
Curran v. Delaware, 259 F.2d 707 (3rd Cir. 1958)	12
Ellis v. United States, 120 App.D.C.271, 345 F.2d 961 (D.C. Cir. 1965) (concurring opinion)	11
Giles v. Maryland, 386 U.S. 66 (1967)	6
Holland v. United States, 318 U.S. 332 (1943)	6
Irvin v. Dowd, 366 U.S. 717 (1961)	10
Jackson v. California, 336 F.2d 521 (9th Cir. 1964)	7
Jencks v. United States, 353 U.S. 657 (1957)	13
Lee v. United States, 125 App. D.C. 126, 368 F.2d 834 (D.C. Cir. 1966)	12
Levin v. Clarke, U.S. App. D.C. No.20682 (Nov. 11, 1967), 95 Wash.L.Rep. 2031	10
Levin v. Katzenbach, 124 App.D.C. 156, 363 F.2d 287 (D.C. Cir. 1966)	7,12,13
Lollar v. United States, 126 App.D.C. 200, 376 F.2d 243 (D.C. Cir. 1967)	7
McCullar v. Super. Ct., 70 Cal.Rptr. 21 (Cal.App. 1968)	12

Cases:	Page
McNabb v. United States, 318 U.S. 332 (1943)	6
Mooney v. Holohan, 294 U.S. 103 (1935)	6
People v. Kiihoa, 53 Cal. 2d 748, 3 Cal.Rptr.1 (1960)	12
Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965)	9
Pyle v. Kansas, 317 U.S. 213 (1942)	6
United States v. Clarke, 220 F.Supp. 905 (E.D.Pa. 1963)	7
United States v. Consol. Laund. Corp., 291 F.2d 563 (2d Cir. 1961)	12
United States v. Margeson, 259 F.Supp.256 (E.D. Pa. 1966)	9
United States v. Myers, 327 F.2d 174 (3rd Cir. 1964)	7
United States v. Stern, 225 F.Supp. 187 (S.D.N.Y. 1964)	9
United States v. Tateo, 214 F.Supp. 560 (S.D.N.Y. 1963)	7
Warden v. Hayden, 387 U.S. 294 (1967)	9

Statutes:

4 D.C. Code §172, 175	8

Miscellaneous:

1 Holdsworth, History of English Law (3d Ed. 1922)	7
Goldstein, "State and the Accused: Balance of Advantage" 69 Yale L.J. 1149 (1960)	8
Note, 42 Neb. L.Rev. 127 (1962)	8

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, APPELLEE	
v.	Criminal No. 22,308
JOHN W. McCORD, APPELLANT	

BRIEF FOR APPELLANT

Jurisdictional Statement

Appellant John W. McCord was found guilty on July 9, 1968 of Assault with a deadly weapon and carrying a dangerous weapon in violation of 22 D.C. Code, Sections 502 and 3204. On August 9, 1968 he was sentenced to serve three to nine years on each count, such sentences to be concurrent with each other and consecutive to preceding sentences. On August 9, 1968 appellant filed his notice of appeal and application to proceed in forma pauperis. This court has jurisdiction upon appeal to review the judgment of the district court by virtue of 28 United States Code, Sections 1291 and 1294.

Question Presented

Whether the government has a duty to perform standard tests upon evidence of a crime taken into its possession when it knows that the results of such tests may be vital to the accused's defense. This case was not previously before the Court.

Statement of the Case

On April 15, 1968 appellant was indicted for assault with a deadly weapon and carrying a dangerous weapon in violation of 22 D.C. Code Sections 502 and 3204, and upon arraignment on April 26, 1968 he pleaded not guilty to both charges. Trial was held before Gesell, J., on July 8 and 9, 1968, at which time appellant was represented by Marvin E. Preis, Esq., retained counsel. At the trial the government presented seven witnesses: the injured party, four people who were present at the shooting, and two of the police officers who investigated the event. Although on points of detail the eyewitness testimony differed, and occasionally conflicted, at least four of the five civilian witnesses testified that they saw appellant shoot the complaining witness with the gun introduced in evidence. 1/

The following are the facts relevant to the issue presented by this appeal. When the police arrived at the scene of the crime they found an apartment containing six people: the

---

1/ The fifth testified only that he saw the gun in appellant's hand immediately after the shooting.

appellant, his two cousins, Clyde and Earl Moton (who were brothers), the lessee of the apartment, Leroy Powell, and two teenage boys, Harry Marshall and Eugene Gaskins (tr. 196). The alleged shooting had occurred at least a quarter of an hour previously (tr. 94-95); the door was open (tr. 194), and those present apparently were calm (tr. 96-101, 134-36, 168-69, 196-97). The weapon was nowhere in sight (tr. 196-97). The appellant was seated in a chair in the living room diagonally across from the entrance to the apartment (also in the living room) (tr. 199, 252) and Clyde Moton, the complainant, was just emerging from the bathroom, having cleaned a wound to his leg (tr. 196). Officer Kelly, who took charge of the investigation (tr. 195) asked Mr. Moton who shot him (tr. 209) and was told that appellant had done it (tr. 205-06, 60-67, 208). Meanwhile, another officer present, Mr. Maloney, spoke to Earl Moton, who indicated that the gun was on a table in the dining room (tr. 231, 98, 92). Mr. Powell, at about the same time, apparently stated that appellant had just put the gun there.2/

2/ There is some conflict in the testimony as to whether Mr. McCord had the opportunity to place the gun on that table. Mr. Powell testified that appellant had the gun in his hand the whole time since the shooting and tried to hand him the gun after the police arrived, and, being unsuccessful, that he had put it on the table (tr. 97-98). On the other hand, officer Kelly and appellant testified that the latter was seated during the time the police were there, and Mr. McCord added that he had been seated the whole time he was in the apartment (tr. 252-53, 199-200).

Mr. McCord protested, and officer Kelly told him to be quiet (tr. 252). Following complainant's accusation, appellant was put under arrest (tr. 208). The officers then took statements from each of the witnesses (tr. 218), all of whom agreed that appellant had shot complainant (tr. 222-25), and finally they asked appellant what his story was (tr. 252-53). Mr. McCord stated that a third boy, a friend of the two who later testified, had been in the room, argued with Clyde Moton, and pulled a gun, that he (appellant) had grabbed the boy's arm, causing a harmless shot to be fired, that he had then left the apartment[3/], expecting Clyde (who had driven him there) to follow, that the latter had not done so, that when he had heard a second shot fired, he returned indoors to see what had happened, and that soon thereafter the police had arrived (tr. 248-53). There was no testimony at the trial that anyone present at the time of arrest contradicted at that time appellant's description of the event.

The officers made no attempt to search for the other bullet or to cause a fingerprint test to be made of the gun (tr. 218), although they went to some lengths to establish that the gun actually worked, (tr. 191-92). There was no suggestion that anyone had wiped the gun off or had even touched it.

3/ Mr. Powell also testified that Mr. McCord left the apartment at one point (tr. 96-97).

Summary of Argument

Appellant's defense was that he was framed; he made this as clear at the time of his arrest as he did at the trial (tr. 235). Nevertheless, the officers placed him under arrest upon the accusation of the complainant and took statements from everyone else present before asking the appellant for his version. Then, apparently believing the witnesses and disbelieving the accused, they made no effort to fully investigate the scene of the crime or to test the weapon for fingerprints. The simple procedure for fingerprint testing is practically routine for the police, who have the equipment, expertise, and exclusive possession of the weapon; for the defendant, however, it is a tremendous obstacle. By erecting this obstacle, by believing the witnesses and refusing credence to the defendant and not conducting a completely impartial investigation, thus depriving appellant of substantial material evidence bearing directly upon his guilt, the police effectively prejudged the appellant. This, however, is the antithesis of their proper function. It is the jury's function to judge the evidence, not the police's, and proper fulfillment of that function requires complete presentation of each side's version of the incident. When the government weights the picture presented to the jury, thus molding the latter's decision, it deprives the defendant of the fair and impartial decision to which he is entitled.

ARGUMENT

THE GOVERNMENT IS REQUIRED TO PERFORM STANDARD TESTS UPON A WEAPON TAKEN INTO ITS POSSESSION AS THE INSTRUMENTALITY OF A CRIME WHEN IT KNOWS THAT THE RESULTS OF SUCH TESTS MAY BE VITAL TO THE ACCUSED'S DEFENSE

A. The Need for the Jury to Receive a Complete Picture of the Event

More than thirty years ago the Supreme Court held that prosecutorial coloring of the evidentiary picture presented to the jury, by offering knowingly perjured testimony, denied a defendant the due process of law to which he is entitled. 4/ Mooney v. Holohan, 294 U.S. 103 (1935). 5/ In 1963 the Supreme Court summed up the holdings it had had occasion to make in the intervening years in Brady v. Maryland, 373 U.S. 83, 87:

> "The suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution".

The need for a request was never actually before the court, and, as Mr. Justice Fortas pointed out in Giles v. Maryland, 386 U.S. 86, 102 (1964) (concurring opinion), the result should not turn upon the "advantageous circumstance of a request.

4/ Appellant relies not only upon his constitutional right to due process but also upon the court's duty to regulate the conduct of trials in the district court for the District of Columbia. McNabb v. United States, 318 U.S. 332, 340-41 (1943).

5/ Police conduct, of course, is included in references to the state, the government, or the prosecutor. Pyle v. Kansas, 120 App. D.C. 271, 345 F.2d 961 (D.C. Cir. 1965); Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964).

If the defense does not know of the existence of the evidence, it may not be able to request its production. A murder trial - indeed any criminal proceeding - is not a sporting event". This view was adopted in this circuit in Levin v. Katzenbach, 124 App. D.C. 158, 363 F.2d 287 (D.C. Cir. 1966).

The rule, fairly stated, is that the jury should be presented with all evidence which is relevant, material, and available. 6/ Its purpose is simple, "our system of justice suffers when any accused is treated unfairly". 7/ Brady v. Maryland, Id. at 87. Thus, for example, the government must identify important witnesses (E.g. United States v. Myers, 327 F.2d 174 [3d Cir. 1964]), and if reasonably possible, produce those witnesses if defendant cannot. (E.g. United States v. Clarke, 220 F Supp. 905 [E.D. Pa. 1963]). Faced with leads likely to support the accused's version of the facts, it has a duty to follow those

---

6/ At their genesis, juries were charged with gathering all the evidence themselves through witnesses or personal knowledge, and making a decision based on the totality of their knowledge. It was only later that juries were limited to the evidence adduced at trial. 1 Holdsworth, History of English Law, 317-21, 328-40 (3d ed. 1922). Someone else, therefore, must make sure that all evidence is considered. The government by virtue of resources, ability, and duty to govern impartially, is the natural selection. See Campbell v. United States, 365 U.S. 85, 96 (1961).

7/ A defendant, of course, is entitled to a fair trial no matter how overwhelming the evidence against him. Lollar v. United States, 376 F.2d 243, 126 U.S. App. D.C. 200 (D.C. Cir. 1967); Jackson v. California, 336 F.2d 521 (9th Cir. 1964); Allison v. Holman, 326 F.2d 294 (5th Cir.) Cert. denied, 376 U.S. 957 (1963); United States v. Tateo, 214 F.Supp. 560 (S.D. N.Y. 1963).

leads up, Holland v. United States, 348 U.S. 121, 135-36 (1955). Basically, it must investigate the crime. Commonwealth ex rel. Sheeler v. Burke, 74 Pa. D. & C. 241, aff'd en banc 367 Pa. 152, 79 A.2d 654 (1951). 8/

B. The Burden on the Defendant Resulting from Failure to Investigate Impartially

When the government fails to fully investigate a crime, it puts a heavy burden on the defendant, who usually has neither the ability nor facilities to do the job himself, nor the sophistication, and often the funds, to know how to get it done for him. 9/ This is particularly true of the weapon to which the

---

8/ Although the District of Columbia Code does not specifically charge the police with the duty to investigate fully, this is inherent in their position. It is notable that private detectives making an arrest are required to turn over all property which "may become evidence" 4 D.C. Code § 172 and that it is unlawful for a police officer to aid any accused to "escape a full judicial examination by failing to give known facts or reasonable causes for suspicion, or withholding any information relative to the charges". 4 D.C. Code § 175.

9/ See, Application of Kapatos, 208 F.Supp. 883, 888 (S.D. N.Y. 1962), Goldstein, "The State and the Accused: Balance of Advantage", 69 Yale L.J. 1149 (1960) and Note, 42 Neb.L.Rev. 127, 131-32 (1962):

> "In many cases the most damaging evidence against defendants are the fingerprints on a weapon, a scientific report on bloodstains, a ballistics test or an autopsy report. Even if these reports may not be admissable at trial, their results often prove innocence as well as guilt, and for that reason, may be quite vital to the defense for impeachment purposes. The state has unlimited access to modern scientific aids and it is making more and more use of these devices. The defendant is often innocent and generally cannot afford to make independent tests on his own."

police have the right to exclusive custody and the decided advantage in testing ability. 10/ As a result, the government helps shape a trial which bears unfairly on the defendant. Campbell v. United States, 365 U.S. 85, 96 (1961). In Sheeler, for example, the police pounced upon the petitioner as the most likely suspect and ignored all leads pointing to a contrary conclusion. Upon application to the Supreme Court of Pennsylvania, that court appointed a sepcial master to investigate the behavior of the police, the prosecutor, and the trial judge. In his report the master pointed out that:

> "When the police willfully or recklessly suppress or falsify evidence as to material facts within their reach, and thus mislead the court and counsel for the Commonwealth and for defendant, the court en banc has not been permitted, as the statute commands, to proceed "by examination of witnesses to determine the degree of the crime and give sentence accordingly". Instead, the court's judgment and sentence have been unwittingly led by police distortion and suppression of facts which if accurately presented would undoubtedly have lead the court to direct the withdrawal of the pleas of guilty and the substitution of not guilty pleas". 174 Pa. D. & C. at 269.

10/ Warden v. Hayden, 387 U.S. 294, 307-08 (1967); Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); United States v. Margeson, 259 F. Supp. 256 (E.D. Pa. 1966); United States v. Stern, 225 F. Supp. 187 (S.D. N.Y. 1964).

Failure to fully and completely examine the salient aspects of a crime and the consequent inequitable burden imposed on the defendant, hardly comports with the prosecutor's role as the representative "of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all".[11] Berger v. United States, 295 U.S.78(1935) To be impartial, the government may not speculate as to the effect of particular evidence on a jury, for "reversal is required even if the (suppressed evidence's) only significance were in the way a jury might have viewed it". Levin v. Clark, U.S. App. D.C. No. 20682 (Nov. 11, 1967), 95 Wash. L. Rep. 2031. A jury cannot decide impartially if it does not have all the evidence before it.[12] See Brady v. Maryland, in which the court reversed because of prosecutorial activity that

> "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not the result of guile...." 373 U.S. at 87.

C. Prejudice to the Accused

From the time of his arrest, appellant asserted his

11/ This duty may be contrasted with the defendant's Constitutional protection from self-crimination.

12/ It would be well to note that if the jury comes to the trial with a preconceived opinion - one not based on the facts of record - the defendant has been deprived of his right to a jury trial. See Irvin v. Dowd, 366 U.S. 717 (1961). The result should be the same if the jury bases its opinion only on some of the relevant and material facts.

innocence, both of assault and of even holding the gun. Nevertheless, the government failed to conduct a simple scientific test of this claim and eventually introduced the weapon at trial (G. Ex. 1). The innocent and negligent failure to investigate the facts and examine the evidence which it possesses is just as damaging to the accused as innocent or negligent failure to reveal evidence definitely tending to exculpate him. Chief Judge Bazelon pointed this out in Ellis v. United States, 120 App. D.C. 271, 273, 345 F.2d 961, 963 (D.C. Cir. 1965) (concurring opinion):

> "The purpose of a trial is as much the acquittal of an innocent person as it is the conviction of a guilty one. The average accused usually does not have the manpower or resources available to the state in its investigation of the crime. Nor does he have access to all of the evidence, much of which has usually been removed or obliterated by the time he learns that he is to be tried for the crime.
>
> Where, because of defendant's poverty, exculpatory information may be more readily available to the government, it has a duty to bring that information forward or explain its failure to do so. Elementary justice requires no less".

The fact that the government did not know whether proper investigation could reveal evidence helpful to the defendant is irrelevent, for that lack of knowledge was its own doing, caused by its own negligence. Similarly, the government has made determination of actual prejudice to the defendant virtually impossible for the court, for apparently the gun was freely handled during the trial, with no attempt to preserve fingerprints. The government should not, however, be able to shield itself behind its own negligence. If a test revealed that some-

one in the room besides appellant had held the gun or that appellant had not held it, the government would have been required to reveal the report thereof upon pain of reversal of any conviction. Levin v. Katzenbach, supra. By failing to make the test, it should not be able to escape its responsibility.

Negligent destruction of evidence is as harmful as its negligent non-disclosure, even if the precise nature of the evidence is unknown. United States v. Consolidated Launderies Corp., 291 F.2d 563 (2d Cir. 1961); Curran v. Delaware, 259 F.2d 707 (3d Cir. 1958); People v. Kiihoa, 53 Cal. 2d 748, 3 Cal. Rptr. 1 (1960). See also Lee v. United States, 125 App. D.C. 126, 368 F.2d 834 (D.C. Cir. 1966), which involved failure to comply with the Jencks Act. The point, as this court has often pointed out, is not the mental condition of thepolice but the possible prejudice of the defendant.

> "A criminal trial is not a game of wits between opposing counsel, the cleverer party, or the one with the greater resources, to be the 'winner'". Levin v. Katzenbach, 124 App. D.C. 158, 162, 363 F.2d 287, 291 (D.C. Cir. 1966).

In the Kiihoa case, for instance, the police permitted their informer to leave the jurisdiction before charging the defendant, thus precluding the latter from obtaining his testimony, which, though unknown, would have related to the material issue of identification: The California Supreme Court reversed the conviction holding the defendant entitled to obtain the evidence. 13/

13/ See also McCullar v. Super. Ct., 70 Cal. Rptr. 21 (Cal. App. 1968) in which the police permitted vital evidence to be destroyed on the assumption that they would no longer need it; the conviction was reversed.

D. Limited Scope of Appellant's Argument

Appellant recognises that no decided case has explicitly held that the government must adequately and fully investigate a crime and follow through on the evidence it obtains. Nevertheless, implicit in analagous cases is recognition of the government's duty to treat its citizens fairly and not to present a biased picture to the jury and of the court's obligation to avoid prejudice to the defendant growing out of an "equal" application of rules. 14/

> "The theory of these cases is that the government has a responsibility to do more than merely seek convictions. It must also, as a protector of the public interest, assure so far as possible that the defendant has a fair trial and that he is acquitted if innocent". Levin v. Katzenbach, 124 App. D.C. 158, 161 n.6, 363 F.2d 287, 290 n.6 (D.C. Cir. 1966).

14/ Thus, in Jencks v. United States, 353 U.S. 657 (1952) the government argued that it should not be required to disclose its records until a conflict in the testimony has been found, for the rule of full disclosure "disregards the legitimate interest that each party - including the government - has in safeguarding the privacy of its files.." The court held, however, that

> "The rationale of the criminal cases is that, since the government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake the prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to the defense". Id at 671 (emphasis added).

Appellant merely asks that the government develop relevant and material evidence in its possession so as to enable the jury to consider all evidence, that favorable to the accuser and that favorable to the accused. Appellant is not asking that the government be required to find and produce defendant's evidence; he is simply asking that the government not ignore objects which it possesses, especially those as to which it is entitled to exclusive possession, or leads with which it is presented. If the evidence so developed would not favor the defendant, no harm is done the prosecution, but if it does favor the defendant, then the police and the prosecutor have fulfilled their duty to see that justice is done. In the absence of such an impartial investigation, appellant's trial did not conform to the standards of fairness to which he was entitled. His conviction on each count, therefore, should be reversed.

Conclusion

Appellant's convictions should be reversed.

Respectfully submitted,

Andrew J. Kilcarr
1819 H Street, N.W.
Washington, D.C. 20006

Attorney for Appellant,
John W. McCord

Of counsel:

Jonathan E. Gaines

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,308

UNITED STATES OF AMERICA,

Appellee

-v-

John W. McCord,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR APPELLANT

ANDREW J. KILCARR
1819 "H" Street, N.W.
Washington, D.C. 20006

Counsel for Appellant

Of Counsel:

Jonathan E. Gaines

TABLE OF CONTENTS

	Page
Question Presented	1
Statement of the Case	1
Argument	3
THE REFUSAL OF THE TRIAL COURT TO PROHIBIT INTRODUCTION OF APPELLANT'S CRIMINAL RECORD DEPRIVED APPELLANT OF A FAIR TRIAL	
Conclusion	6

Authorities

Cases:	Page
Brown v. United States, 124 U.S. App. D.C. 209, 363 F.2d 696 (1966).	3
Evans v. United States, 150 U.S. App. D.C. 114, 397 F.2d 675 (1968).	4
*Gordon v. United States, 127 U.S. App. D.C. 343, 383 F.2d 936 (196), cert. denied 390 U.S. 1029 (1968).	3,4,5
*Luck v. United States, 121 U.S. App. D.C. 151, 348 U.S. 763 (1968).	2,6
*United States v. Coleman, ____ U.S. App. D.C. ____, ____ F.2d ____ (No. 22,316, 7/4/69).	3,4,5,6
Williams v. New York, 337 U.S. 241 (1949).	5

*Cases or authorities chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,	:	
APPELLEE	:	
v.	:	Criminal No. 22,308
JOHN W. McCORD,	:	
APPELLANT	:	

SUPPLEMENTAL BRIEF FOR APPELLANT

Question Presented

Whether the District Court properly exercised its discretion when it denied Appellant's motion to prohibit introduction into evidence of his criminal record.

Statement of the Case

In 1954 Appellant had been convicted of housebreaking and larceny, and in December, 1965 Appellant had been released on parole. The crime for which he is convicted had occurred in February, 1968. At the trial of the case sub

judice, prior to the presentation of Defendant's evidence, Appellant moved under Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965) that his "prior record not be brought to the jury's attention" on the grounds that the Defendant would have to testify in order to make his defense and that the conviction which the government sought to introduce was too remote in time (tr. 175-78). The motion was denied on the following grounds (tr. 178-81): (1) The period during which Appellant was incarcerated could not be considered in determining remoteness. (2) "The ruling on the Luck matter has nothing to do with Defendant's right to take the stand". (3) The trial was one turning entirely on the credibility of the witnesses. (4) The credibility of the government's witnesses had been attacked and it would be unfair to permit the Defendant to conceal his entire past.

ARGUMENT

THE REFUSAL OF THE TRIAL COURT TO PROHIBIT INTRODUCTION OF APPELLANT'S CRIMINAL RECORD DEPRIVED APPELLANT OF A FAIR TRIAL

(tr. 175-81)

Under Luck v. United States, supra "the defendant with a criminal record may ask the court to weigh the probative value of his convictions against the degree of prejudice which revelation of his past crimes would cause; and he may ask the court to consider whether it is more important for the jury to hear his story than to hear about the prior conviction in relation to his credibility". Gordon v. United States, 127 U.S. App. D.C. 343, 383 F.2d 936, 939 (1967), cert. denied 390 U.S. 1029 (1968). In the instant case the trial judge failed fully to exercise the discretion thus vested in him and, to the extent he did exercise it, he erred as a matter of law.

In order to adequately exercise his discretion, the trial court must consider the testimony to be presented by the defendant. United States v. Coleman, ____ U.S. App. D.C. ____, ____ F.2d ____ (No. 22,316, 7/11/69); Gordon v. United States, supra. This it failed to do. As a result, it could not have adequately weighed the competing needs of the government and of the defendant in the particular circumstances of the case being tried. Ibid.; Brown v. United

States, 124 U.S. App. D.C. 209, 363 F.2d 696 (1966).

Furthermore, to the extent it did engage in the necessary weighing process, the trial court erred in placing the importance of credibility to the outcome of the case in the government's pan. This factor appears to be one which can weigh as heavily on the defendant's side as on the government's, depending upon whether the "balance of credibility" which would exist after the defendant's testimony (here unknown to the trial court at the time of his decision) is even, as in Gordon, or favors the government, as in Coleman. Where the government's case is strong and the defendant must rely on his own testimony, an opportunity for him to present his own "version of the affair, unembarrassed by mention of his previous difficulties with the law, could very well [be] crucial". United States v. Coleman, supra, slip opinion at 5. See also Evans v. United States, 130 U.S. App. D.C. 114, 397 F.2d 675 (1968). It is submitted that this case is far more analogous to Coleman than to Gordon and hence that the trial court's failure to consider the difference between the types of situations represented by each case resulted in prejudicial error.

Among the factors examined by the trial judge, the nearness or remoteness in time of the prior conviction is a consideration "of no small importance". Gordon v. United States, 383 F.2d at 940. It is also one which is affected

by the nature of the crime involved. Ibid. The court below apparently held the appellant's prior conviction to be not too remote solely because, as a matter of law, periods of imprisonment cannot be a gauge of remoteness. It erroneously failed to consider the relation between the age of the conviction and the crime there involved. Furthermore, its affirmative holding is inconsistant in law with the rule that imprisonment is primarily rehabilitative, Williams v. New York, 337 U.S. 241 (1949), and unfair to the defendant. There is no reason why opportunity for acts reflecting on credibility could not occur in a prison and not only, as the trial judge asserted, when one is "out in society". The effect of the trial court's rule was to remove, arbitrarily, eleven years from appellant's life, so as to make a conviction which occurred in 1954 in law occur in 1965. Since a fourteen year old housebreaking and larceny conviction probably is too remote, United States v. Coleman, supra, appellant submits that the court below committed plain and prejudicial error.

The other grounds assigned by the trial judge for his decision reflect misconceptions of the law. The fact that the defendant has attacked the credibility of prosecution witnesses does not necessarily imply that the government may use the tool of prior convictions to attack the defendant's credibility. Gordon v. United States, supra.

Furthermore, granting of a Luck motion does not mean, as the trial court stated, that the defendant's entire past may be concealed from the jury. Finally, the principle upon which Luck and subsequent cases rest does indeed involve the defendant's right to testify on his own behalf. United States v. Coleman, supra.

The outcome of the trial might have been different had defendant been freed of the prejudice inherent in introduction of his prior conviction, and, but for the omissions, errors, and misconceptions described herein, he should have been so freed.

Conclusion

Appellant's convictions should be reversed.

Respectfully submitted,

Andrew J. Kilcarr
1819 H Street, N.W.
Washington, D.C. 20006

Attorney for Appellant
John W. McCord

Of counsel:

Jonathan E. Gaines

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-v-

JOHN W. McCORD,

Appellant.

No. 22,308

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC AND MEMORANDUM IN SUPPORT THEREOF

Petition and Suggestion

John W. McCord, by his court appointed attorneys, pursuant to Federal Rules of Appellate Procedure, Rules 35(b) and 40, hereby petitions the court for a rehearing of his cause and, in the alternative, suggests that such rehearing be held by the court en banc.

Memorandum

This cause was argued before Circuit Judges Fahy and Robinson on September 25, 1969.[1/] The appellant's convictions for assault with a dangerous weapon and carrying a dangerous weapon were affirmed by this court in an opinion dated December 1, 1969 (hereinafter referred to as Slip

1/ The third member of the panel, Chief Judge Bazelon, was not present at the argument.

Opinion, p. __).

At the trial, appellant moved under Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965) that he be permitted to testify on his own behalf without embarrassment by his prior convictions. The motion was denied as to 1954 convictions for housebreaking and larceny. On review, this court held that "[t]he trial judge's decision to admit the conviction was premised on his conclusion that the pertinent date for Luck consideration was 1965, when the appellant was released from prison. This misreads Luck and its progeny," for the relevant date is the date of conviction. (Slip Opinion, p. 3 [footnote omitted]). The opinion also expressed doubt as to the relevance of a past conviction for housebreaking. (Slip Opinion, pp. 2-3) Nevertheless, this Court held that the error was not reversible for the following reasons:

(1) Appellant's trial counsel apparently agreed with the judge's ruling because he did not object to it.

(2) Appellant in fact did testify in his own behalf.

(3) Appellant's trial counsel introduced the conviction himself.

It is respectfully suggested that the error was reversible and that the above reasons for holding to the contrary are inconsistent with established law. That the admission of a prior conviction, even with a limiting

instruction, 2/ can have a substantial prejudicial effect on the verdict is implicit in the principles underlying Luck. Gorden v. United States, 127 U.S. App. D.C. 343, 346, 383 F.2d 936, 939 (1967); Pinkney v. United States, 24 U.S. App. D.C. 209, 363 F.2d 696 (1966). In the present case and in United States v. Coleman, ___ U.S. App. D.C. ___, ___ F.2d ___ (July 11, 1969), the Court emphasized that this is particularly true in a case where credibility is crucial. The facts specified by the court and enumerated above do not ameliorate this prejudice.

(1) Objection to ruling. Besides the fact that there is no indication in the record that appellant's trial counsel had an opportunity to object, Tr. 181, as a matter of law such an objection is not required. Federal Rules of

---

2/ And the instruction here was not as limiting as this Court suggests it ought to have been. Compare Slip Opinion, p. 3, lines 4-8, with Tr. 322. The court charged: "A defendant's prior criminal conviction is admitted into evidence solely for your consideration in evaluating the credibility of the Defendant as a witness. It is not evidence of the Defendant's guilt of the offenses with which he is charged. You must not draw any inference of guilt against the Defendant from his prior conviction."

This Court held: "The prejudicial propensity of past convictions demands that as the probative value of a conviction lessens, greater caution be exercised in admitting it into evidence and that the trial judge explain to the jury the lesser weight to be given the conviction in evaluating the witness' testimony." [footnote omitted]

Criminal Procedure, Rule 51.[3] Thus in Hill v. United States, 401 F.2d 995 (9th Cir. 1968), the court held that it could consider appellant's objections even though no formal motion had been made, for the appellant's trial counsel had plainly presented the matter to the judge.[4] Since there was no duty to object, and perhaps not even the opportunity to do so, this Court should not have drawn any inference from the trial attorney's apparent decision not to pursue his point after the judge had ruled thereon.

(2) The fact the appellant did testify. The court infers from the fact that appellant did testify on his own behalf that he was not discouraged from testifying by the prospect of impeachment by his prior convictions, and hence that he admitted such impeachment to be non-prejudicial. If silence by the defendant is requisite to preservation on appeal of his objections, this duty has never been made clear by the court. In Jones v. United States, 131 U.S. App. D.C. 88, 402 F.2d 639 (1969) this Court specifically held:

3/ Rule 51 reads: "Exceptions to rulings or orders of the court are unnecessary . . . and it is sufficient that a party, at the time the ruling . . . is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object, . . . the absence of an objection does not thereafter prejudice him."

4/ Compare Worthy v. United States, 409 F.2d 1105, ___ U.S. App. D.C. ___ (1968). In that case this court held that when an objection is raised for the first time on appeal, the court is free not to consider it.

"The fact that the defendant takes the stand does not, of course, preclude his raising the Luck point on appeal." Id. at n.5. See also Luck v. United States, supra; Gorden v. United States, supra; Pinkney v. United States, supra; Barber v. United States, 129 U.S. App. D.C. 193, 392 F.2d 517 (1968). Indeed, since part of the rationale of Luck is that the defendant is entitled to a determination of whether "the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility", Luck v. United States, 121 U.S. App. D.C. at 156, 348 F.2d at 768, the fact that a defendant did testify after an adverse ruling is irrelevant in a review thereof. See Williams v. United States, 129 U.S. App. D.C. 332, 394 F.2d 957 (1968) (concurring opinion), cert. denied, 393 U.S. 984 (1968). Furthermore, as the concurring opinion in Williams points out, there is no guarantee that the defendant will not take the stand even after an adverse Luck ruling.

After the ruling, still confronted with the choice of whether to remain silent or to suffer embarrassment by introduction of his prior convictions, appellant chose to present the best case possible rather than to remain silent and present no case at all. However, this certainly should not be taken as a judgment by appellant that any prejudice resulting from introduction of his record would be de minimus; at best it reflects only a determination that to testify would be the lesser of two evils. If he had not testified, he would have been able to present no affirmative case at all.

Furthermore, reliance by the court on the fact that appellant did in fact testify is in effect a determination that appellant had waived his objection. Appellant had no reason to believe that by risking the substantial prejudice of impeachment by prior conviction he would lose his right to reversal by this Court if on appeal such impeachment were deemed improper. In the absence of a clear choice, such a waiver could not possibly have been an intelligent one. See, e.g. Miranda v. Arizona, 384 U.S. 436 (1966); Williams v. United States, supra, 129 U.S. App. D.C. at 339, 394 F.2d at 964 (concurring opinion).

(3) Introduction of prior convictions by appellant's own trial counsel. Following the adverse ruling, appellant's attorney naturally endeavored to soften the effect of introduction of the prior conviction by first raising it himself. Such efforts to conduct a good defense should not be held against the appellant, for the fact remains that the conviction was improperly admitted. In Luck and in Pinkney, as well as in its opinion in the present case, this Court emphasized that even instructions by the court may be insufficient to neutralize the prejudice injected into the trial by former convictions, and in its opinion in this case it suggested that such instructions ought to minimize the importance of such evidence, something the instructions in this case did not do. If this is so, then the mere fact that the first mention of the conviction was by defendant could not significantly affect the inherent prejudice.

For the above reasons, it is respectfully submitted that the reasons advanced by the Court for holding the error in this case to be unreversible are at variance with its prior cases and hence that the convictions ought to be reversed.

Conclusion

The panel that decided this case ought to reconsider its decision, or the court en banc should rehear the case.

Respectfully submitted,

Andrew J. Kilcarr

Andrew J. Kilcarr

Jonathan E. Gaines

1819 H Street, N.W.
Washington, D.C. 20006

Attorneys for Appellant,
John W. McCord